

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTIN RUDDICK)	
Claimant)	
VS.)	
)	
THE BOEING COMPANY)	Docket No. 187,724
Respondent)	& 187,764
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award upon review and modification entered by Administrative Law Judge John D. Clark dated June 12, 1996. The Appeals Board heard oral argument on December 3, 1996.

APPEARANCES

Claimant appeared by his attorney, Michael L. Snider of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant, in his Application for Review, listed the following issues:

- (1) Whether the Administrative Law Judge properly calculated the Award pursuant to the “new act” provisions of K.S.A. 44-510e(a).
- (2) The nature and extent of claimant’s disability.
- (3) Whether respondent can unilaterally terminate payment of benefits under an existing award prior to the entering of an order modifying an existing award.
- (4) Whether claimant’s counsel is entitled to a reasonable attorney fee pursuant to K.S.A. 44-536(g).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, hearing arguments and considering the briefs of the parties, the Appeals Board finds that the Award of the Administrative Law Judge should be modified.

The findings of fact by the Administrative Law Judge as set forth in his Award are generally not disputed by the parties. Claimant agreed that respondent paid 94 weeks of permanent partial disability compensation and 12 weeks of temporary total disability compensation for the period of March 29, 1994, through April 7, 1996. The parties likewise agreed with the finding that the original Award should have been modified to find claimant’s entitlement to permanent partial disability benefits based upon a work disability ended March 18, 1996, when claimant returned to work with respondent at a wage equal to 90 percent or more of the average gross weekly wage the claimant was earning at the time of his injury. Accordingly, from that date forward claimant’s entitlement to permanent partial disability compensation would be limited to his 14 percent functional impairment. Furthermore, at oral argument the parties did not dispute the finding that claimant’s percentage of functional impairment is 14 percent. What claimant did dispute was: (1) the method of calculation of benefits employed by the Administrative Law Judge, (2) the failure of respondent to continue payment of permanent partial disability benefits through to the date of the Administrative Law Judge’s Award, and (3) the Administrative Law Judge’s

failure to award claimant's attorney a reasonable fee.

With regard to the first issue, the Appeals Board finds that the method of calculation of the award employed by the Administrative Law Judge was correct. In Romeo v. Smith Temporary Services, Docket 184,711 (December 22, 1995) the Appeals Board said that when there is a change in the disability rate the award must be recalculated using the new or latest disability rate as though no permanent partial benefits had been paid. Any weeks of disability benefits previously paid are credited against the latest disability award. In Romeo, the Appeals Board found:

"If the disability rate goes down, as when the claimant returns to work after being off for a period of time, and if the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more."

Such is the situation in this case and the Administrative Law Judge followed the rules set forth in Romeo in finding no permanent partial disability benefits to be due and owing. See *a/so Bohanan v. USD 260*, Docket No. 190,281 (November 14, 1995); Deviney v. Oakwood Villa Care Center, Docket No. 179,026 (October 31, 1996).

The issue of whether respondent should have continued payment of permanent partial disability compensation pursuant to the original Award pending a decision on its application for review and modification is controlled by K.A.R. 51-19-1, which provides in pertinent part:

"Where application for review and modification pursuant to K.S.A. 44-528 is made by a respondent from an award which is in full force and effect, compensation payments are to continue until it is finally determined that the original award is to be modified and the amounts determined. The filing of the application for review and modification does not carry with it the right to stop compensation being paid under an award."

Accordingly, respondent should have continued to pay the ordered permanent partial disability compensation pursuant to the terms of the July 12, 1995 Award until the June 13, 1996 effective date of the Award on review and modification.

The issue of claimant attorney's entitlement to an award of a reasonable fee pursuant to K.S.A. 44-536(g) should first be presented to the Administrative Law Judge, including any claim for attorney fees connected with this appeal.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated June 12, 1996, should be, and is hereby, modified to award claimant an additional 9.71 weeks of permanent partial disability compensation at the rate of \$313.00 per week in the amount of \$3,039.23, for the period of April 8, 1996 through June 12, 1996.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

I respectfully dissent from the opinion of the majority regarding the respondent's obligation to continue payment of permanent partial disability compensation pursuant to the original Award pending a decision on respondent's Application for Review and Modification. The majority cites K.A.R. 51-19-1 which would seem to indicate continuation of payments is appropriate. It is significant, however, that K.A.R. 51-19-1 discusses appeals to the District Court upon an Award when review and modification is made to the Director. K.A.R. 51-19-1 was created at a time when the appeals process was significantly different in that the computation of awards allowed for a much slower payout at a reduced rate. The new computation formula contained in K.S.A. 44-510e allows for a much faster payout at a higher rate. It is significant also that there is no provision allowing for reimbursement should an overpayment occur.

It is this board member's opinion that, absent some provision for reimbursement to the respondent for an overpayment, the prohibitions of K.A.R. 51-19-1 should not be applied to the new award computation formula of K.S.A. 44-510e.

K.S.A. 44-528 does allow the effective date of a review and modification to be up to six months prior to the date the application was made. This infers that, should an overpayment occur, reimbursement from the claimant might be considered as an option.

This board member would agree that should respondent stop payment and it later be found that the cessation of payment was improper, the provisions of K.S.A. 44-536(g) and the provisions of K.S.A. 44-5,120 through K.S.A. 44-5,125 would be applicable.

In all other regards I agree with the opinion of the majority in this matter.

BOARD MEMBER

DISSENT

I disagree with the majority's finding that claimant is entitled to an award of an additional 9.71 weeks of permanent partial disability benefits for that period after claimant returned to work for the respondent.

Review and modification of this award is governed by K.S.A. 44-528. Regarding the effective date of modification of the award, subsection (d) of that statute provides:

"Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be **effective as of the date that the increase or diminishment actually occurred**, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section."
(Emphasis added.)

Pursuant to the above statute, the effective date of the award's modification is March 18, 1996, the date claimant returned to work for the respondent. As of that date, claimant's permanent partial general disability should be reduced to the 14 percent whole body functional impairment rating. Because respondent had paid more than the 58.1 weeks awarded for a 14 percent functional impairment before the effective date of the modification, respondent does not owe more than the 94 weeks of permanent partial disability benefits it previously paid.

The majority completely disregards the provisions of K.S.A. 44-528(d) and has made the effective date of the Administrative Law Judge's Award on June 13, 1996, as the

effective date of the modification. Such is error. The majority bases such error upon K.A.R. 51-19-1. Although that regulation clearly provides that respondents are not to discontinue payments upon filing an application for review and modification, it does not purport to, and may not, override the provisions of K.S.A. 44-528(d). If benefits are terminated before the review and modification award, claimants may seek redress for such nonpayment either under the penalty statute, K.S.A. 44-512a, or the fraud and abuse statutes.

BOARD MEMBER

- c: Michael L. Snider, Wichita, KS
Vaughn Burkholder, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director